

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-212867; B-212867.2; DATE: February 15, 1984
B-212867.3
MATTER OF: Vycor Corporation; Computer Switch, Inc.;
Locom Corporation

DIGEST:

1. Even though a supplier to a disappointed offeror generally would not be an interested party to protest, its contentions will be considered where the offeror has protested to GAO on the same basis.
2. A protest is untimely where it was not filed with GAO or the contracting agency within 10 working days after the protester learned of its basis of protest. Neither the good cause nor the significant issue exceptions to the timeliness requirement are applicable.
3. A protest against an agency's application of requirements not contained in a solicitation is denied where the protester was orally informed of the requirements and given an opportunity to respond, but could not comply with them.

Vycor Corporation, Computer Switch, Inc. and Locom Corporation protest the Social Security Administration's (SSA) rejection of Vycor and Locom's proposals under request for proposals (RFP) No. SSA-RFP-83-0174 for a computer switching system. We find no merit to the protests.

SSA rejected the proposals because they did not comply with the mandatory requirement in paragraph F.3.1 of the RFP that an offeror have "the same computer switches as proposed, currently installed in government or commercial sites by the date set for the receipt of proposals, and such equipment must have performed successfully (e.g., be certified for payment under lease or purchase for the thirty (30) calendar day period prior to the date set for receipt of proposals)." Specifically, SSA found that the

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vendors had not offered switches which were currently installed as a "network of remotely controlled switches." The protesters contend that paragraph F.3.1 contains no requirement that the currently installed switches either be networked or remotely controlled.

Preliminary Matters

Computer Switch did not submit a proposal in response to the RFP; it is a supplier of the switches proposed by Vycor. Generally, a supplier to a disappointed bidder or offeror is not an interested party for the purpose of filing a bid protest under our procedures. See Radix II Incorporated, B-208557.3, November 29, 1982, 82-2 CPD 484. However, since Vycor has protested directly to this Office on the same basis, we will consider Computer Switch's contentions. See Platt Manufacturing Corporation; National Forge Company, B-206340, B-206340.2, January 10, 1983, 83-1 CPD 17.

SSA argues that Locom's protest is untimely. The agency notes that Locom admits it was advised by telephone on August 22, 1983 that its proposal had been rejected because none of the sites submitted in response to paragraph F.3.1 had more than one switch controlled by a remote control. SSA asserts that since Locom did not file its protest with us until September 30, the protest is untimely under our Bid Protest Procedures which require that protests such as this be filed within 10 working days after a basis of protest is known or should have been known. See 4 C.F.R. § 21.2(b)(2) (1983).

The record shows that by letter dated September 9, 1983, Locom protested the rejection of its proposal to SSA. Since our procedures allow for the filing of protests either with us or the contracting agency, it is the September 9 date which is relevant for the purpose of determining timeliness. Nevertheless, we agree with SSA that the protest is untimely since September 9 is still more than 10 working days after Locom learned of the basis for its protest.

Locom asserts that regardless of the timing of its protest, we should consider it under section 21.2(c) of our

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procedures which allows for consideration of untimely protests for good cause shown, or where issues significant to procurement practices or procedures are raised. We do not consider application of either exception to be appropriate in this case.

The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the timely filing of a protest. Ensign Aircraft Company, B-207898.3, April 1, 1983, 83-1 CPD 340. That is not the situation here.

The significant issue exception applies where a protest raises an issue of widespread interest to the procurement community, not previously considered. Universal Design Systems, Inc.--Reconsideration, B-211547.3, August 16, 1983, 83-2 CPD 220. In order to prevent the timeliness requirement from becoming meaningless, this exception is strictly construed and seldom used. Id. Locom's protest does not present unique issues of first impression; therefore, the exception will not be applied here.

Locom is, however, an interested party to Vycor's protest. Consequently, we will consider its arguments to the extent that they support Vycor's timely protest. See Southwestern Bell Telephone Company; Northern Telecom, Inc., B-200523.3, B-200523.4, B-200523.5, May 5, 1982, 82-1 CPD 203.

Merits

Computer Switch alleges that Vycor's proposal was rejected due to anti-small business bias on SSA's part. Where bias is alleged, the protester has the burden of affirmatively proving its case, and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Ted L. Biddy and Associates, Inc., B-209297; B-209297.2, April 22, 1983, 83-1 CPD 441. Computer Switch has offered no support for its allegation of bias nor does anything in the record support it. Therefore, we can only regard the allegation as purely speculative. Id.

Vycor argues that SSA improperly rejected its proposal because paragraph F.3.1 only required that the offeror have

the same switches as proposed currently installed, but did not also require that those switches be networked and remotely controlled. SSA asserts that even if the specifications were deficient in this regard, events subsequent to the receipt of proposals served to overcome this deficiency. Specifically, SSA states that after Vycor's proposal was initially found technically unacceptable, it contacted Vycor to ensure that the protester understood the requirement and also requested additional information to determine if Vycor could comply.

In support of its position, the agency cites our decision in Southland Associates, 62 Comp. Gen. 50 (1982), 82-2 CPD 451. There, we denied a protest against the agency's application of a requirement not contained in the solicitation because the offeror was orally informed of the requirement during negotiations and afforded an opportunity to respond to it.

Vycor acknowledges that it was orally informed of the actual requirement. In addition, the record shows that it subsequently responded in writing to SSA's request for additional information. Vycor stated that it had one currently installed, remotely controlled switch like the ones offered and had the capability to network the switches, but did not have any networked switches currently installed. Thus, Vycor's protest would appear to fall within the rationale of Southland Associates since like Southland, Vycor was informed of the agency's actual requirements and given an opportunity to respond to them.

Locom argues, however, that informing an offeror of the actual requirements and allowing it to respond was not adequate to cure the solicitation deficiency in this case. This is because the RFP indicated that the switches had to be installed and have performed successfully for at least 30 calendar days prior to the date set for receipt of proposals. An offeror which was not informed of SSA's actual requirements until after the deadline for proposal submission obviously could never come into compliance with them.

Nevertheless, even if an offeror which did not meet the agency's actual network requirements when the RFP was

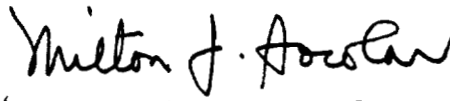
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issued did understand them at that time, we do not believe it could have come into compliance with them by the closing date for receipt of proposals. The RFP only provided 34 calendar days for proposal preparation. None of the protesters suggests, and we think it unlikely, that an offeror who did not meet the operating requirements at the time the RFP was issued could do so in this time frame. In our view, it is not reasonable to conclude that this could be accomplished in the period available for proposal preparation.

In addition, we note that Vycor has not suggested that it could or would have offered switches other than those it actually proposed if it had known of the actual requirements. Consequently, we conclude that Vycor could not have complied with SSA's actual requirements even if it had known of them at the time the RFP was issued, and we deny its protest.

For the future, however, we are recommending that SSA take steps to insure that its requirements are stated as clearly and accurately as possible in forthcoming solicitations.

Vycor and Computer Switch's protests are denied. Locom's protest is dismissed.


for Comptroller General
of the United States